CRIMES AGAINST HUMANITY: THE NEW CHALLENGES TO IMPUNITY

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The British Law Lords on 24 March 1999 by a majority of six to one decided to refuse to General Augusto Pinochet, the retired dictator of Chile, the "sovereign" immunity, that he had thought was due to him on account of his status as a former Head of State. On 15 April, the British Minister of the Interior Jack Straw, authorized the continuation of the extradition proceedings requested by Spain[1]. Other countries, like Belgium, France, Italy, Luxembourg, Sweden and Switzerland also introduced extradition requests.

Despite the substantial reduction of the "extraditable" charges decided by the Law Lords, and whatever will be the final decision of the British judicial authorities, the initial refusal of immunity by itself represents a significant progress of international penal law.

The decision of the Law Lords confirms and extends the law of Nuremberg, which itself integrated and "criminalized" the law of Geneva and the law of The Hague. The law of Nuremberg affirmed the individual penal responsibility of high political and military officials in particular with respect to war crimes and crimes against humanity. Despite accusations of partiality, the justice of the victors – raised against the Nuremberg and Tokyo trials, an accusation of having retroactively applied the law of war and international humanitarian law which had foreseen neither the prosecution before an international tribunal, nor punishments – the death sentence or imprisonment – by such a court, the military Tribunals of Nuremberg and Tokyo established the first legal bases, the rule of procedure and the jurisprudence that were to guide the creation of the Tribunals for Former Yugoslavia and for Rwanda.

The creation of these two Tribunals by the UN Security Council was also criticized in its turn as representing an "illegal" extension of the powers of the Council. However, these two Tribunals were not subjected to the accusation of retroactivity of the relevant legal norms, and, contrary to the Nuremberg and Tokyo Tribunals, their composition is truly international. There can be no more question of the justice of the victors.

The statutes of the Tribunals for Former Yugoslavia and for Rwanda added in the list of possible causes for accusation the crime of genocide to war crimes and to crimes against humanity, and included rape under crimes against humanity. Although those who have carried the main

[1] *Le Monde*, 16 April 1999.

responsibility for the crimes committed in Former Yugoslavia have not all been prosecuted, nor arrested, currently 26 accused are in detention in The Hague. These include a Serbian General, recently arrested and indicted of crimes committed in connection with the fall of Srebrenica. Seven of the accused have been condemned to prison sentences for violations of the law or the customs of war, for serious violations of the Geneva Conventions and/or for crimes against humanity. Before the Tribunal for Rwanda, a former Prime Minister has admitted his guilt for the crime of genocide and has been sentenced to life imprisonment.

However, one should note that among the many problems encountered by the two International Penal Tribunals currently in activity, in the absence of an international police force and because of the lack of political will by certain governments, the arresting of the accused constitutes a major obstacle to the efficient administration of justice.

At the level of international law, a number of conventions adopted since the Second World War, have reinforced the foundations for an international penal law. These include: the 1948 *Convention on the Prevention and Punishment of the Crime of Genocide*; the 1968 *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity*; the 1973 *International Convention on the Suppression and Punishment of the Crime of Apartheid* and the 1984 *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.* The adoption by the United Nations General Assembly of a resolution, in 1973, on the *Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity* must also be recalled. Finally, the representatives of 120 states adopted in Rome, on 17 July 1998, the Statute of the future *International Criminal Court.* The Rome Treaty was adopted with the resolute support of a strong coalition of NGOs, in spite of obstacles and objections raised by two permanent members of the Security Council, the United States and China, and despite the reticence of many countries anxious to uphold the principle of national sovereignty in the particularly sensitive field of criminal justice[2].

The ruling of the Lords first rejects, with a majority, the impunity of Heads of States with regards to the most serious crimes: war crimes, crimes against humanity, torture and genocide. It admits that under certain conditions any State has the competence to judge such crimes. Lord Hutton declared that "a single act of torture committed by an agent of the State, or any person acting in an official manner or at the State's instigation, is a crime of international law, and torture does not become a crime under international law only when it is committed on a large scale". Jack Straw declared that "torture and conspiracy with a view to commit torture are extraditable crimes".[3]

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[2] Cf. Y. Beigbeder, *Judging War Criminals, The Politics of International Justice*, Macmillan Press Ltd/St. Martin's Press, Inc., 1999.

[3] *Le Monde*, 26 March 1999, 17 April 1999.

The immediate motive for General Pinochet's arrest in London and for his judicial misfortunes is the result of the investigation and request made by a Spanish "little judge", Baltasar Garzon, a tenacious and brave judge. Garzon's initiative took place in the context of a world more favourable to the receding of impunity. We can thus observe a number of important and favourable developments: the transition of dictatorial regimes, in particular in Latin America, with the inevitable jolts and reversals towards democracy; the collapse of the communist regimes in Eastern Europe that allowed the gradual establishment of democracy in the countries that had been the satellites of the former USSR; the end of Apartheid in South Africa that permitted both the creation of the Truth and Reconciliation Commission and penal prosecutions. More generally there has been in several countries there has been an evolution of opinion according to which political and military leaders must be held responsible and possibly judged for their offenses and crimes, that is to say the loss of their "sacred" status and the application also to them of the principle of equality of the citizens. Also, judges have been able to better assert their independence from the government in countries where the judicial power was traditionally, more or less openly, subordinated to the executive branch. Finally, this trend was reinforced by the vigorous action and public statements of the main international human rights NGOs, including the International Federation for Human Rights, Human Rights Watch and Amnesty International, as well as of courageous political dissidents (who may or may not belong to national NGOs).

Nevertheless, this breakthrough of international penal law "will not make active or retired dictators quiver". Thus, the former lifetime General-President of Uganda, Idi Amin Dada, who was responsible for the deaths of 100,000 to 300,000 of his fellow countrymen, lives in comfortable exile in Saudi Arabia[4]. Also, this advancement of international penal law does not prevent, for the time being, the serious violations of human rights which are being perpetrated under our eyes, notably in Kosovo, in the Democratic Republic of Congo, in Sierra Leone, or in Sudan.

Obstacles do remain to the weakening or the erosion of the impunity of heads of States' impunity. At the national level the following may be mentioned:

- in the first place, there are the surviving still numerous despotic regimes and their resistance. They continue to ignore and to reject all obligations with respect to human rights and humanitarian law. The situation is similar in the countries which are in the throes of internal wars;
- next comes the legitimate but often abusive defence of national sovereignty. This includes the reluctance of military authorities to accept national and above all international jurisdiction over their actions or exactions, the rejection by the military of impartial investigations and of effective sanctions;

[4] *Le Monde*, 11-12 April 1999.

- we may add the imposition of amnesty by the military rulers as a price to be paid for their agreeing to giving up their power and accepting a smooth and peaceful passage to democracy.
- the refusal or the delays put by national authorities to integrate international norms (crimes against humanity, genocide, torture) in their legislation, are also important obstacles;
- the deliberate refusal of the incapacity of national jurisdictions to judge offences or crimes of their own leaders as well as the rejection of extradition requests regarding their nationals.

At the international level, there are also many political, military, diplomatic or commercial considerations that slow down or block requests for extradition. Thus, one could witness the pressures exerted on the British authorities by the governments of Chile and of the United States and by the Vatican to dissuade them from authorising General Pinochet's extradition – not to mention the widely publicised visit by Margaret Thatcher to the former dictator.

Among the problems created by national judicial systems, one can mention, for example, that in France it has taken half a century to judge the few survivors accused of to have committed crimes against humanity during World War II. In fact, for a long time the highest French Appeals Court (Cour de Cassation) upheld an exceedingly restrictive interpretation of crimes against humanity. Thus, the authors of these crimes, or accomplices, could be indicted only if they had been acting in the name of a European State pursuing a policy of ideological hegemony. It was only in 1994, that the new French Penal Code integrated the notions of genocide and other crimes against humanity, by then totally disconnected from World War II. Yet, in March 1996, the Appeals Court of Nîmes ruled that the Investigative Judge Privas who had indicted a Rwandan priest suspected of having participated to the genocide in his country, had to jurisdiction. According to the Appeals Court, the accusation of genocide could not be brought against the Rwandan priest in France for facts having taken place in Rwanda and having been presumably committed by a Rwandan. However, a Rwandan also suspected of having participated in the massacres during the genocide is currently being tried before a military court of justice in Lausanne in Switzerland[5].

We must also mention the refusal by the Prime Minister Hun Sen of Cambodia to have the principal Khmer Rouge leader responsible for the Cambodian genocide to be judged by an international tribunal. And yet, earlier, on June 21, 1997, the two prime ministers, Prince Norodom Ranariddh and Hun Sen had addressed a letter to the UN Secretary General asking for the assistance of the United Nations and of the international community to help establish the truth about the rule of Khmer Rouge Regime in Cambodia from 1975 to 1979 and to bring to justice the

[5] *Le Monde*, 24-25 March 1996, 15 April 1999. Since then, Fulgence Niyonteze has received a life sentence for his participation in the genocide. *Le Monde*, 6 mai 1999.

persons responsible for the genocide and the crimes against humanity committed during this period[6]. At that time, there was hope that a third international penal tribunal would be established for Cambodia, a hope that has not been fulfilled.

One has to take into account these problems and obstacles, and one should not expect in short or medium term a major expansion of the enforcement of criminal law at the international level. Nevertheless, the decision of the Law Lords must be greeted as a significant challenge to the impunity of those who have committed crimes against humanity and as a new stage in the slow progression of humanity towards a greater respect of international humanitarian law. There will be no peace between peoples, nor within countries torn by internal conflicts, without the quest for and discovery of truth and the passing of justice.

[6] Doc. ONU A/51/930, S/1997//488 24 June 1997.